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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF	)	
	)	CC 96-115
INTERPRETATION OF SECTION 222	)	
OF THE TELECOMMUNICATIONS ACT	)	
OF 1996	)	

PETITION OF THE NYNEX TELEPHONE COMPANIES FOR A DECLARATORY RULING AS TO THE INTERPRETATION OF SECTION 222 OF THE COMMUNICATIONS ACT

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I. SUMMARY

Section 702 of the newly-enacted Telecommunications Act of 1996 added to the Communications Act a new section 222, headed "Privacy of Customer Information". A key provision of § 222 prohibits any telecommunications carrier from using, disclosing, or permitting access to individually identifiable customer proprietary network information ("CPNI") that the carrier receives or obtains by virtue of its provision of a telecommunications service, *except* in the carrier's provision of the telecommunications service from which such information is derived, or of certain related services.

This provision, if interpreted too narrowly, could have a major impact on existing LEC marketing practices (which rely to a significant extent on the use of CPNI to identify customers who might be interested in particular products or services), on the consumer benefits that such practices create, and on the development and dissemination of new products that are fostered by those practices. For this reason, and because the NYNEX Telephone Companies wish to ensure that their own interpretation of § 222 (and their own actions in accordance with that interpretation) conform to the law, we respectfully seek a Declaratory Ruling as to the meaning and application of the section.

The key interpretive issue is the scope of the term "telecommunications service". For example, certain uses of information related to a particular service would be permissible under § 222 if the information were used in connection with that same service, but would be impermissible if the use were in connection with a *different* service. It thus becomes important to determine what constitutes a single "service".

This memorandum sets forth the arguments supporting what we believe to be the correct interpretation of § 222: one which recognizes two principal wireline "telecommunications services" for purposes of the section's CPNI requirements: (a) intraLATA service (including local services), and (b) interLATA service. (Wireless services would comprise a separate, unified service category for § 222 purposes.) As show below, this interpetation is the one that is most consistent with the statutory language, legislative history, and the purpose and structure of the 1996 Act.

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Pursuant to § 1.2 of the Commission's Rules and § 5(d) of the Administrative Procedure Act, the NYNEX Telephone Companies ("NYNEX")[1] respectfully move for a declaratory ruling as to the interpretation of the newly-enacted § 222 of the Communications Act.[2]

II. INTRODUCTION

Section 702 of the Telecommunications Act of 1996, which became law on February 8, added to the Communications Act a new section 222, headed "Privacy of Customer Information". A key provision of this new section, § 222(c)(1), prohibits any telecommunications carrier from using, disclosing, or permitting access to individually identifiable customer proprietary network information ("CPNI")[3], that the carrier receives or obtains by virtue of its provision of a telecommunications service, *except* in the carrier's provision of:

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[1] The NYNEX Telephone Companies are New York Telephone Company and New England Telephone and Telegraph Company.

[2] The text of § 222 is included as an appendix to this petition.

[3] CPNI is defined in § 222(f)(1) as "(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship;

(A) the telecommunications service from which such information is derived, or

(B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.[4]

Section 222 also provides that *aggregate* CPNI may be used or disclosed by a LEC for a purpose other than one described in § 222(c)(1) only if the LEC provides such aggregate information to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefor.[5]

These provisions, if narrowly interpreted, could have a major impact on existing LEC marketing practices[6], on the consumer benefits that such practices create, and on the development and dissemination of new products that are fostered by those practices. The magnitude of the impact depends largely on the scope of a "telecommunications service". If, for example, local dialtone and toll usage were considered separate "telecommunications services", individually identifiable CPNI related to a customer's subscription to one of those services could not be con-

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and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier, except that such term does not include subscriber list information".

[4] There is an exception to this prohibition for uses or disclosures of CPNI that are required by law or approved by the customer. (§ 222(c)(1)) Additionally, § 222(d) specifically permits the use of CPNI "(1) to initiate, render, bill and collect for telecommunications services; (2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services; or (3) to provide any inbound telemarketing referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service".

[5] Section 222(c)(3). "The term 'aggregate customer information' means collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed." (§ 222(f)(2))

[6] Such practices may rely to a significant extent on the use of individual CPNI to identify customers who might be interested in particular products or services, and on the use of aggregate CPNI to develop marketing strategies for new and existing products.

sulted in the marketing of the other. Moreover, under that interpetation even *aggregate* information related to dialtone and other local services could not be used to develop marketing strategies for toll usage, unless such information were made available to competitors. Such an overly narrow interpretation could significantly impair LEC marketing efforts and reduce the public benefits that such marketing efforts create.

Because there is significant uncertainty as to the proper interpretation of § 222, because an overly narrow interpretation could significantly harm the interests of the movants and their customers (and of other LECs and their customers), and because the NYNEX Telephone Companies wish to ensure that their own interpretation of the section (and their own actions in accordance with that interpretation) conform to the law, we respectfully seek a declaratory ruling as to the meaning and application of the section.

Specifically, we set forth herein the arguments supporting what we believe to be the correct interpretation of § 222: one which recognizes two wireline "telecommunications services" for purposes of the section's CPNI requirements: (a) intraLATA service (including local services)[7], and (b) interLATA service.[8]

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[7] For purposes of this memo, "intraLATA service" is considered to include local usage, toll usage, residence and business end-user exchange access (dialtone) service, and services such as Caller ID and Call Waiting. It is not intended to include enhanced/information services such as Voice Messaging Service.

[8] Two points should be noted at the outset about the scope of this petition. First, we believe that the proposed service division into interLATA, intraLATA, and wireless buckets is a conservative interpretation of § 222. Although we do not urge a broader interpretation here, we do not believe that it would be unreasonable for the Commission to treat all of a company's telecommunications offerings as a single "service" for purposes of § 222.

Second, this petition is confined to issues related to information derived from and used in connection with end-user services. We do not at this time seek any ruling as to the extent to which information related to exchange access (carrier access) services may be used by a LEC in the marketing of retail products.

(Although the issue is not discussed in detail below, we believe that it would be appropriate to treat wireless services as a separate, integrated "bucket" for purposes of § 222. In other words, wireless service would be deemed to be a single service which is separate from either wireline intraLATA telecommunications services and wireline interLATA telecommunications services. Such treatment is reasonable in light of the long history of structural separation between wireless and wireline services, and because wireless companies offer a wide variety of services on an integrated basis.[9])

Before discussing the rationale for the interLATA/intraLATA interpretation, it may be of interest to consider its effect on LEC operations. Most existing marketing practices will be able to continue, since they would entail the use of information relating to a "service" (intraLATA service) in the marketing of the same service.[10] However, a company would *not* be able to use CPNI related to wireline intraLATA service: (a) in the marketing of interLATA service (for example, in the case of a BOC, when the BOC gets interLATA authority under the Act), or (b) in the marketing of information services or other non-telecommunications products and services.

III. DISCUSSION

A. Statutory Language

The language of the Act does not clearly indicate the precise scope of the term "telecommunications service". The term is defined in section 3(51) of the Communications Act (as added by § 3 of the 1996 Act) as "the offering of telecommunications for a fee directly to the

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[9] We do not address the issue of how this service classification would apply to wireless services that become a substitute for local exchange service.

[10] Section 222(c)(1) permits individually identifiable CPNI related to a service to be used to "provision" that service or other services used in the provision of that service. The term "provision" should be interpreted to include the process of locating and signing up customers.

public, or to such classes of users as to be effectively available directly or to the public, regardless of the facilities used". "Telecommunications" is in turn defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received".[11] These definitions essentially tell us that a telecommunications service is a service entailing the common carriage transmission of user-specified information, but do not resolve the question of whether "intraLATA service" should be regarded as one service or several under the Act.

The Communications Act as it existed prior to the 1996 amendments, and those amendments themselves, do identify and define several "services", such as "telephone exchange service" (Communications Act § 3(18), as amended by §3(a)(1) of the 1996 Act)[12], "telephone toll service"[13] (Communications Act § 3(19)), "interLATA service" (Communications Act § 3(42), as added by § 3 of the 1996 Act), and "basic service" (Communications Act § 274(I)(2), as added by § 151(a) of the 1996 Act). The trouble with using these definitions in the interpretation of § 222, however, is that they are neither mutually exclusive nor collectively exhaustive. The definitions of "interLATA service" and "telephone toll service", for example, overlap; and there is no clear guidance on how services such as Caller ID would be classified.

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[11] Communications Act § 3(48).

[12] Telephone exchange service is defined as "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications serivce".

[13] Telephone toll service is defined as "telephone service between stations in different exchange areas for which there is a separate charge not included in contracts with subscribers for exchange service".

In short, the statutory language does not resolve the issue, and guidance must be sought elsewhere.

B. Legislative History

There is significant support in the legislative history for applying the intraLATA/inter-LATA distinction in the interpretation of Section 222. The Senate and House bills on which the 1996 legislation was based each manifested, albeit in different ways, an intent to restrict the use or disclosure of information across the interLATA/intraLATA border.

The CPNI issue was addressed briefly in the § 102 of the Senate Bill[14], which would have added § 252 to the Communications Act. The primary focus of proposed § 252 was a separate affiliate requirement for information services, manufacturing, and non-incidental in-region inter-LATA services. It was in that context that § 252(g) dealt with "Proprietary Information". That section essentially prevented *disclosure* of the information (in particular to the separate subsidiary), but not its internal use:

- Subsection (g)(1) provided that a BOC could not share aggregate CPNI with its affiliates unless such information were made available to other carriers.

- Subsection (g)(1)(A) provided that individually identifiable CPNI could be shared with the separate affiliate (or with any unaffiliated entity) only with the consent of the person to which the information related or from which it was obtained.

In short, the Senate bill seemed to regard the CPNI restrictions as incidental to the general issue of the competitive safeguards that were to be enforced in connection with interLATA relief and with BOC entry into manufacturing and information services. The Senate bill would have

[14] S. 652 (104th Cong., 1st Sess.).

prevented the Company from using its CPNI to facilitate its entry into the interLATA market. It would not have prevented the Company from using CPNI to market its existing intraLATA/local services.

In the House bill[15], which had a more limited structural separation provision than the Senate bill, the privacy provisions were included in a separate section (§ 105 of the House bill, adding § 222 to the Communications Act). The key provision authorized carriers to use CPNI to the extent necessary "in the provision of common carrier services", and prohibited carriers (except as required by law or approved by the customer) from "us[ing] [CPNI] in the identification or solicitation of potential customers for any service other than the telephone exchange service or telephone toll service from which such information is derived".

The House bill's use of the terms "telephone exchange service" and "telephone toll service" is significant. The Communication Act's definition of the term "exchange service" is based on local calling areas rather than LATAs, and this definition was clearly preserved under the Act as amended in 1996. However, under the MFJ, the complementary term "interexchange" meant "interLATA", and an "exchange area" corresponds to a LATA.[16] The House Report seems to adopt the MFJ definition (and thus to conflate the concepts of "local" and "intraLATA"), and this fact must be kept in mind in interpreting the House bill:

> The MFJ designated exchange areas as Local Access and Transport Areas (LATAs), within which the Bell Operating Company (BOC) is the local telephone service provider. . . . As a result of these provisions, BOCs could provide local telephone services but were restricted from competing against interLATA or interexchange carriers. [p. 3]

[15] H.R. 1555 (104th Cong., 1st Sess.).

[16] *See* MFJ §§ II(D)(1), IV(K), IV(G).

> The local telephone service exchange connects callers within an exchange area, and also connects subscribers to the long distance company of their choice. [Id.]

The focus of the House bill on the interLATA/intraLATA boundary is also suggested by the House Report's discussion of § 222:

> The protections contained in section 222(b) and (c) represent a careful balance of competing, often conflicting, considerations. First, of course, is the need for customers to be sure that personal information that carriers may collect is not misused; this consideration argues for strict controls on a carrier's use of all customer data. Customers, on the other hand, rightfully expect that when they are dealing with the carrier concerning their telecommunications services, the carrier's employees will have available all relevant information about the service. This consideration argues for looser restrictions on internal use of customer information. This balance is reflected in subsections 222(b) and (c), which impose strict controls, with limited exceptions for the carrier's use of customer information in connection with providing its own services to that customer. For example, a carrier is not required to obtain the approval of customers to use customer information in the provision of common carrier communications services, or services necessary to, or used in, the provision of such services, such as the publishing of diretories by a carrier or affiliate.
>
> Section 222(b)(1)(B) prohibits the use of CPNI "in the identifications [sic] or solicitation of potential customers for any service other than the service from which such information is derived." *The Committee intends that "service" be defined narrowly. Thus, in no event should the section be construed to permit a carrier to use CPNI to market long distance services to their local customers or local telephone exchange services to their long distance customers.* [Emphasis supplied.]

In short, the House bill, when interpreted in the context of the House Report provisions referring to "**exchange areas**", seems to be principally concerned with the use of information across the inter-/intraLATA boundary, an approach which is consistent with that of the Senate

bill (in which, as noted above, the privacy provisions were incidental to interLATA structural separation).[17] (It is also worth noting that the Report regards this as a "narrow" interpretation.)

C. Inferences From Overall Structure and Policy of Statute

Thus, the interLATA/intraLATA interpretation is not inconsistent with the statutory language, and is supported by the legislative history.

It is, moreover, consistent with one of the overall themes of the bill, which is the convergence of the telecommunications industry, and in particular the entry of long distance carriers into the local market and traditional local telephone companies into the long distance market. That theme suggests a concern with carriers making competitive use of information derived from their traditional markets, in entering their new markets.

Moreover, the proposed interpretation is consistent with public policy.

First, by permitting the continuation of many existing LEC marketing practices, it would encourage the dissemination of new products and services. Such encouragement was clearly an important goal of Congress in enacting the 1996 legislation. *See* House Report at 1 ("Technological advances would be more rapid and *services would be more widely available* and at lower prices if telecommmunications markets were competitive rather than regulated monopolies. Consequently, the Communications Act of 1995 opens all communications services to competition. The result will be lower prices to consumers and businesses, *greater choice of services, more innovation*, a competitive edge for American businesses, and less regulation."); Conference Report at 146 (describing purposes of the legislation as including provision of "a procompetitive,

[17] The Conference Report states that "[t]he conference agreement adopts the Senate provisions with modifications". However, the structure of the final legislation more closely resembles that of the House bill.

de-regulatory national policy framework *designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans* by opening all telecommunications markets to competition . . . .") (emphasis supplied).

Second, the proposed interpretation would improve customer service by allowing LECs to direct targeted marketing efforts towards consumers who are most likely to need, want, and benefit from the LEC's existing (intraLATA) products and services. As the House Report, quoted above, noted, "[c]ustomers, on the other hand, rightfully expect that when they are dealing with the carrier concerning their telecommunications services, the carrier's employees will have available all relevant information about the service".

As the Commission addresses this issue it may be helpful for it to consider a recent, closely-related ruling of the New York Public Service Commission ("NYPSC") in its general inquiry into privacy in telecommunications (Case 90-C-0075). In that case, the NYPSC issued eight "principles", or general guidelines, relating to privacy. Principle No. 7 provides in part that

> [u]nless a subscriber grants informed consent, subscriber-specific information generated by the subscriber's use of a telecommunications service should be used only in connection with rendering or billing for that service or for other goods or services requested by the subscriber. It may not otherwise be made available except as required by law.

If read narrowly, this principle, like § 222, could have prohibited customary and beneficial carrier practices. In particular, New York Telephone Company raised concerns that the principle could inhibit such reasonable practices as reviewing a customer's service records to determine what products and services might be of interest or benefit to the customer. In response to these concerns, the NYPSC clarified the principle, emphasizing that "we do not mean to bar a telephone company from using subscriber-specific information to bring to a customer's attention

service modifications that might benefit the customer", that "[b]ecause the principles are guidelines and presumptions only, they allow for that flexibility", and that the Commission had not intended to prohibit telephone companies from making "judicious use" of customer information in order to bring "potentially beneficial service modifications" to a customer's attention.[18]

As recognized by the NYPSC, judicious use of CPNI can benefit customers. The Commission should not interpret § 222 in a way that precludes the continuation of such benefits.

IV. CONCLUSION

For the reasons set forth above, the Commission should recognize two wireline "telecommunications service" for purposes of § 222(c)(1) of the Communications Act: intraLATA service and interLATA service.

Respectfully submitted,

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[18] Case 90-C-0075, *Proceeding on Motion of the Commission to Review Issues Concerning Privacy in Telecommunications*, "Revised Statement of Policy on Privacy in Telecommunications" (issued and effective September 20, 1991), at 17.

V. APPENDIX: TEXT OF SECTION 222

SEC. 222. PRIVACY OF CUSTOMER INFORMATION.

(a) IN GENERAL- Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.

(b) CONFIDENTIALITY OF CARRIER INFORMATION- A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

(c) CONFIDENTIALITY OF CUSTOMER PROPRIETARY NETWORK INFORMATION-

(1) PRIVACY REQUIREMENTS FOR TELECOMMUNICATIONS CARRIERS-Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

(2) DISCLOSURE ON REQUEST BY CUSTOMERS- A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer.

(3) AGGREGATE CUSTOMER INFORMATION- A telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service may use, disclose, or permit access to aggregate customer information other than for the purposes described in paragraph (1). A local exchange carrier may use, disclose, or permit access to aggregate customer information other than for purposes described in paragraph (1) only if it provides such aggregate information to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefor.

(d) EXCEPTIONS- Nothing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers, either directly or indirectly through its agents—

(1) to initiate, render, bill, and collect for telecommunications services;

(2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services; or

(3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service.

(e) SUBSCRIBER LIST INFORMATION- Notwithstanding subsections (b), (c), and (d), a telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.

(f) DEFINITIONS- As used in this section:

(1) CUSTOMER PROPRIETARY NETWORK INFORMATION- The term "customer proprietary network information" means—

(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information.

(2) AGGREGATE INFORMATION- The term "aggregate customer information" means collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed.

(3) SUBSCRIBER LIST INFORMATION- The term "subscriber list information" means any information—

(A) identifying the listed names of subscribers of a carrier and such subscribers" telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and

(B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.